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Zalazilah bin Mohd Yunus v Public Prosecutor

B COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO B-05–105–04 OF 2012
AZIAH ALI, ZAKARIA SAM AND ABANG ISKANDAR JJCA
18 MAY 2015

C *Criminal Procedure — Appeal — Appeal against conviction and sentence — Accused convicted for trafficking drugs and sentenced to death — Whether accused had knowledge of drugs — Whether defence was concocted — Whether trial judge carried out maximum evaluation of evidence adduced — Dangerous Drugs Act 1952 s 39B(1)(a)*

D

A police team led by PW7 had conducted surveillance on an area where it was suspected that a certain drug trafficking activity would take place. The appellant entered the scene riding a motorcycle and was apprehended by the police. From the basket of the appellant's motorcycle, a bag was recovered and
E two packets of compressed material wrapped in plastic were found in it. The appellant was charged with an offence under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('DDA') at the High Court for trafficking in 1,735g of cannabis. According to the appellant, he had received a call from one Mohamad Fairus ('PW6'). After the meeting, PW6 took out a bag from
F underneath the table and told the appellant that it was a stolen laptop to be passed to one Hafiz. PW6 instructed the appellant to stop by the roadside in order for Hafiz to collect it. The appellant submitted that he was arrested at the roadside but Hafiz managed to flee. The trial judge held that the appellant had concocted his story. The appellant was found guilty and convicted for the
G offence and sentenced to death. Hence, the present appeal.

Held, allowing the appeal; setting aside the conviction and sentence imposed by the High Court:

H (1) The appellant's statement to PW7 was made spontaneously. The appellant would have had no time to concoct it because he would have been taken by surprise by the appearance of PW7 and his team. The manner in which the appellant answered PW7 would indicate that the contents of his answer were probably true (see para 20).

I (2) On a balance of probabilities, the defence had rebutted the presumption under s 37(da) of the DDA which was invoked against the appellant. The appellant was acquitted of the charge of trafficking. However, there was sufficient evidence to support an offence of possession under s 6 punishable under s 39A(2) of the DDA. The appellant was caught with

the bag containing the drugs. Therefore, he had possession of the bag and the drugs inside the bag. Knowledge might be inferred from his act of trying to flee (see paras 27–28).

[Bahasa Malaysia summary

Sepasukan polis yang diketuai oleh PW7 telah menjalankan pemantauan di kawasan yang disyaki bahawa aktiviti pengedaran dadah tertentu akan berlaku. Perayu memasuki tempat kejadian tersebut dengan menunggang motosikal dan ditangkap oleh polis. Daripada bakul motosikal perayu, sebuah beg diperolehi dan dua paket material mampatan yang dibungkus dalam plastik dijumpai dalamnya. Perayu dituduh dengan kesalahan di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 ('ADB') di Mahkamah Tinggi kerana mengedar kanabis sebanyak 1,735g. Menurut perayu, dia menerima panggilan daripada seorang yang bernama Mohamad Fairus ('PW6'). Selepas mesyuarat, PW6 mengambil beg di bawah meja dan memberitahu perayu bahawa ia adalah computer riba yang dicuri untuk dberikan kepada seorang yang bernama Hafiz. PW6 mengarahkan perayu untuk berhenti di tepi jalan supaya Hafiz dapat mengambilnya. Perayu berhujah bahawa dia ditangkap di tepi jalan tetapi Hafiz berjaya melepaskan diri. Hakim perbicaraan memutuskan bahawa perayu telah mereka ceritanya. Perayu didapati bersalah dan disabit kesalahan dan dijatuhkan hukuman mati. Maka, rayuan ini.

Diputuskan, membenarkan rayuan, mengetepikan sabitan dan hukuman yang dijatuhkan oleh Mahkamah Tinggi:

(1) Pernyataan perayu kepada PW7 dibuat secara spontan. Perayu mungkin tidak mempunyai masa merekakan ceritanya kerana dia mungkin akan terkejut dengan kehadiran PW7 dan pasukannya. Cara perayu menjawab PW7 akan menunjukkan bahawa kandungan jawapannya mungkin benar (lihat perenggan 20).

(2) Atas imbangan kebarangkalian, pembelaan telah mematahkan anggapan di bawah s 37(da) ADB yang dibangkitkan terhadap perayu. Perayu dilepaskan daripada tuduhan mengedar. Walau bagaimanapun, terdapat keterangan yang mencukupi untuk menyokong kesalahan milikan di bawah s 6 boleh dihukum di bawah s 39A(2) ADB. Perayu ditangkap dengan beg mengandungi dadah tersebut. Oleh itu, dia memiliki beg tersebut dan dadah yang berada dalam beg tersebut. Pengetahuan mungkin dapat disimpulkan daripada tindakannya yang cuba melarikan diri (lihat perenggan 27–28).]

Notes

For cases on appeal against conviction and sentence, see 5(1) *Mallal's Digest* (5th Ed, 2015) paras 301–419.

Cases referred to

PP v Badrulsham bin Baharom [1988] 2 MLJ 585; [1987] 1 LNS 72 (refd)
Mohamad Radhi bin Yaakob v PP [1991] 3 MLJ 169, SC (refd)

Legislation referred to

Dangerous Drugs Act 1952 ss 2, 6, 37(da), 39A(2), 39B(1)(a), (2)

Appeal from: Selongor Criminal Trial No 45A-259 of 2010 (High Court, Shah Alam)

Hisyam Teh Poh Teik (Teh Poh Teik & Co) for the appellant.
Nahra bt Dollah (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Aziah Ali JCA:

[1] The appellant, Zalazilah bin Mohd Yunus was charged with an offence under s 39B(1)(a) punishable under s 39B(2) of the Dangerous Drugs Act 1952 ('the Act'). The charge reads as follows:

> Bahawa kamu, pada 17 Ogos 2010, jam lebih kurang 4.30 petang di tepi Jalan PJU 5/1, Kota Damansara, di dalam Daerah Petaling, di dalam Negeri Selangor Darul Ehsan, telah memperedarkan dadah berbahaya ia itu sejumlah berat 1735 gram Cannabis dan oleh yang demikian, kamu telah melakukan suatu kesalahan di bawah sekyen 39B(1)(a) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah sekyen 39B(2) Akta yang sama.

[2] At the end of the trial, the High Court judge found the appellant guilty as charged. The appellant was convicted and sentenced to death, hence this appeal. At the conclusion of the appeal before us, we allowed his appeal against the conviction and sentence for the offence under s 39B(1)(a). However we found the appellant guilty of the offence of possession under s 6 and punishable under s 39A(2) of the Act. The appellant was convicted and sentenced to imprisonment for 18 years with effect from the date of his arrest and 10 strokes of the rotan.

PROSECUTION CASE

[3] The evidence adduced by the prosecution may be summarised as follows:

(a) on 17 August 2010 at about 12 noon, C/Insp Mohd Shukri bin Zulkifly ('PW7') received a call from a source informing him that a male Malay in his forties riding a motorcycle No KAS 8965 would be carrying out drug trafficking activities in the Jalan PJU 5/1 area between 3pm to 8pm;

(b) at about 3.45pm the same day, PW7 and his team arrived at the said location and conducted surveillance of the area;

(c) at about 4pm, PW7 saw a male (identified as the appellant) wearing a white helmet riding a blue-colored Modenas motorcycle bearing registration No KAS 8965. PW7 and his team followed the motorcycle. PW7 stopped the motorcycle by the side of the road PJU 5/1 near RHB Bank;

(d) according to PW7, at that time the motorcycle was slow and about to stop. The appellant was alone. PW7 said when he identified himself, the appellant appeared frightened and tried to run away but was apprehended;

(e) an examination of the appellant's body revealed no incriminating substance;

(f) PW7 recovered a black bag ('exh P6') from the basket of the appellant's motorcycle and from inside the bag PW7 found two packets of compressed material wrapped in plastic suspected to be cannabis;

(g) PW7 then brought the appellant, the motorcycle, the bag and its contents back to the Damansara Police Station; and

(h) the two packets of compressed material were analysed by the chemist, Suhana bt Ismail ('PW1') who found the substance to be 1,735g of cannabis which formed the subject matter of the charge.

DEFENCE CASE

[4] The appellant gave evidence on oath. He was the sole witness for the defence. His defence can be summarised as follows:

(a) on the morning of the day of the incident, he had gone to the Immigration Department to renew his Indonesian wife's visa. After that he went home and had his lunch;

(b) at about 1.40pm, he received a call from a friend, Mohamad Fairus bin Omar ('PW6') whose wife works with the Immigration Department. According to the appellant, PW6's wife had helped him with his wife's visa previously;

(c) PW6 asked him whether he was free, and if he was, to meet PW6 at Restoran Pelita in Kota Damansara. PW6 said he wanted to find out about the visa matter. So the appellant rode his motorcycle to go and meet PW6;

(d) the appellant arrived at the restaurant at about 2.30pm. He saw that PW6 was already inside the restaurant;

(e) after conversation and drinks, the appellant wanted to leave. Then PW6 took out a laptop bag (exh P6) from underneath the table. PW6 told the appellant the laptop is 'laptop panas', which the appellant understood to mean that it was a stolen laptop;

(f) PW6 requested him to hand over the bag to his friend by the name of 'Hafiz' at a place near the RHB Bank. PW6 told him to stop by the road side and 'Hafiz' will come. According to the appellant, PW6 told him that he had no transport to go to the said place. PW6 gave the appellant RM50 as 'duit minyak';

(g) the appellant agreed to the request since the place where he was to meet Hafiz was not far from the restaurant and also because he was given RM50 by PW6;

(h) when the appellant arrived at the location near the bank, a motorcycle came and stopped in front of him by the road side. The rider of the motorcycle approached him and said that he was 'Hafiz' and asked whether the appellant has the laptop given to him by PW6; and

(i) suddenly a motorcar came and blocked him and Hafiz ran off. The appellant said he was surprised why Hafiz had run away without taking the laptop bag.

[5] The appellant denied that he had tried to run away. He denied that he was carrying drugs. He said that he had told the person who arrested him that his friend, PW6 had asked him to give the bag to Hafiz who had run away. He told the police to arrest Hafiz.

[6] At the police station, the appellant said he was allowed by the police to call PW6. He called and told PW6 that he wanted to meet PW6. PW6 told him that he was at his shop in Chow Kit. The appellant led the police to PW6 who was chatting with his friends and watching television. On arrival, the appellant remained in the police car while two or three policemen got out and arrested PW6.

[7] PW6 in his evidence denied giving any bag to the appellant or asking the appellant to deliver a bag with a laptop to Hafiz. He denied being involved in any drug transaction with the appellant. He denied that he had made arrangements for Hafiz to collect the bag from the appellant.

[8] The explanation given by PW6 as to why he was in the vicinity on the day of the incident was that at about 2pm, he had gone to the Bank Simpanan Nasional at Kota Damansara to deposit money. The bank was near to his house which is in Flora Damansara. When he came out of the bank, he saw the

appellant who was alone. He had asked the appellant about the appellant's wife's visa and the appellant said that it had been done.

[9] PW6 agreed that he was picked up by the police at his shop in Chow Kit pursuant to information given by the appellant. However he was later released by the police. PW6 admitted that he had previously been imprisoned on drug related charges.

DECISION OF THE HIGH COURT

[10] At the end of the defence case, the trial judge found that, at the material time, the appellant had full possession of the bag and had knowledge of the drugs in the bag. Further His Lordship inferred knowledge from the appellant's conduct. His Lordship said as follows (pp 247–248 of the appeal record):

> For any drug trafficking charge to stick it is incumbent upon the prosecution to prove possession of the drugs by the accused. In this case the prosecution's job was made easy by the accused admitting that at the material time he was in custody and control of the black bag from which the drugs were found.
>
> The admission by the accused aside, SP7's evidence that he had tailed accused who was riding the motorcycle alone and the evidence that at all material time the motorcycle was being used by the accused leaves no room for doubt that at the material time it was the accused who had the sole custody of not only of the motorcycle but also of the black bag containing the drugs.

At p 250 the trial judge said:

> In short I accepted the evidence of the prosecution witnesses which clearly proved that at the material time the accused was in full possession of the bag containing the drugs and had also knowledge of the drugs in the bag. The knowledge of the drugs could also be inferred from the conduct of the accused when he desperately tried to escape when being detained by the police.

[11] The trial judge had rejected the appellant's defence that he was given the bag by PW6. The reasons for the trial judge disbelieving the appellant's defence are as follows:

(a) that it was illogical for PW6 not to hand the black bag to Hafiz himself because the appellant himself had testified that the place where the bag was to be delivered could be seen from the restaurant, so PW6 could have just walked to the place;

(b) since PW6 knew the appellant well, he could have chosen a more discreet place to hand over the bag to the appellant and not do it at a restaurant in the sight of everybody;

(c) if the appellant was telling the truth, then he would have at the first available opportunity informed the police about PW6 handing him the

black bag. At no time did the appellant mention to the investigating officer, PW7 that the black bag was given to him by PW6;

(d) PW7 had stated that the appellant did inform him about PW6 but it was in relation to drug related activities; and

(e) PW7 said that there was no one else at the scene when he detained the appellant.

The trial judge accepted the testimony of PW6 and found that the appellant had concocted his story. His Lordship said as follows (p 250 of the appeal record):

> It is clear that the accused had concocted the story about SP6's involvement by taking advantage of a chance meeting with SP6 on the day in question. I believed the testimony of SP6 that he had met the accused by chance outside a Bank on the day in question.

[12] At the end of the defence case, the trial judge found that the appellant has failed to rebut the presumption under s 37(da) of the Act. Further, with reference to s 2 of the Act which provides that 'trafficking' includes 'delivery' as well as 'transport' of dangerous drugs, the trial judge was of the view that it was reasonable to infer that the appellant was carrying the drugs to be handed to someone because, according to PW7, when he was tailing the appellant, he noticed that the appellant was slowing down his motorcycle a number of times as though he was looking out for someone.

THE APPEAL

[13] Learned counsel for the appellant, Mr Hisyam Teh Poh Teik raised two grounds before us:

(a) that the trial judge had failed to carry out a maximum evaluation of the evidence adduced; and

(b) alternatively, that at the highest, this is a case of passive possession.

[14] Learned counsel submitted that the trial judge had failed to appreciate the defence when His Lordship disbelieved the appellant and found that the appellant had concocted the story about the involvement of PW6 because the appellant had failed to disclose his defence to the police at the first available opportunity.

[15] Learned counsel referred us to the grounds of judgment where the trial judge said as follows (p 249 of the appeal record):

> Further if the accused was telling the truth he would have at the first available opportunity informed the police about SP6 handing him the black bag. According

to the investigating officer although the accused had informed him about SP6 it was in relation to drug related activities. It was a (sic) SP6 had served term for drug related offence. However at no time the accused mentioned to the investigating officer that the black bag was given to him by SP6.

[16] Learned counsel further referred us to the testimony of PW7 in cross-examination which shows that the appellant had, upon being asked by PW7, stated that the bag was given to him by PW6 to be given to Hafiz. The testimony of PW7 is as follows (p 116 of the appeal record):

SLM: Inspektor, setuju jika saya cadangkan kepada Inspektor, bahawa setelah beg dadah, beg yang mengandungi dadah tersebut dijumpai, Inspektor telah bertanyakan kepada Zalazilah, yang beliau menyatakan beg itu diberikan oleh Fairus Omar?

SHUKRI: Setuju, Yang Arif

SLM: Setuju?

SHUKRI: Setuju?

YA: Setuju?

SHUKRI: Setuju

SLM: Dan saya juga cadangkan kepada Inspektor, bahawa Zalazilah ini juga menyatakan kepada Inspektor dan serbuan bahawa dia menunggu Hafiz untuk menyerahkan beg tersebut.

SHUKRI: Itu saya tidak pasti.

[17] Apart from the above, learned counsel had submitted that the appellant had also given to the police information which led to PW7 and his team going to Chow Kit where PW6 was arrested.

[18] We agree with learned counsel that, at the time of his arrest, the appellant had, in answer to PW7, told PW7 that the bag was given to him by PW6.

[19] In *Public Prosecutor v Badrulsham bin Baharom* [1988] 2 MLJ 585; [1987] 1 LNS 72, Lim Beng Choon J said:

... it is not wrong to say the accused's state of mind may be gathered from the evidence of what he did or failed to do or what he said on the occasion in question. Putting it shortly, one may say that in order to arrive at a finding of knowledge the court will have to consider the totality of the evidence including any explanations and denials made by the accused and his conduct on the occasion in question.

[20] We are of the view that the appellant's statement to PW7 was made spontaneously in answer to PW7. The appellant would have had no time to

concoct it because he would have been taken by surprise by the appearance of PW7 and his team. The manner in which the appellant answered PW7 would indicate that the contents of his answer was probably true. We agree with the learned counsel that the trial judge has not directed his mind to this evidence when His Lordship disbelieved the appellant and found that the appellant had concocted his story.

[21] Learned counsel had further submitted that the trial judge had failed to adhere to the *Radhi's* direction with regard to PW6 because the defence had adduced evidence through PW6 himself that he had previously been charged for drug related activities. The defence had put to PW6 that he was a trafficker, which he denied. It was submitted that in the present case, PW6 could have been the real trafficker.

[22] We have considered the evidence of PW6 in which he admitted that, at about 2pm on the day of the incident, he had met the appellant at the bank by chance. The appellant stated that he had met up with PW6 at the restaurant. However PW6 denied meeting the appellant at the restaurant.

[23] The trial judge accepted the evidence of PW6 apparently without any reservation. PW6 had 'flatly denied' (to quote the trial judge), giving any black bag to the appellant.

[24] We are of the view that the trial judge ought to have properly addressed his mind to the circumstances of this case and to the evidence which showed that PW6 was involved in drug related activities. Had the trial judge properly considered the evidence, then His Lordship ought to have treated the testimony of PW6 with caution and ought to have considered that his outright denial of involvement with the appellant may be selfserving.

[25] The trial judge found that the appellant had lied when he said that he had agreed to send the bag at the request of PW6 because PW6 had told him that he had no transport. This is what the learned judge said:

> It became apparent that it was the accused who was telling lies when to a question asked to him as to why SP6 himself did not hand the black bag to Hafiz the accused replied that SP6 had no transport. This reply was clearly illogical in the face of the accused own testimony that the place where he was to deliver the bag could be seen from the restaurant where he was sitting with SP6. If the place of delivery was so close by why did SP6 require transport. He could just walk to the place.

[26] It is pertinent to note that according to PW7, the distance from the restaurant to the place where he had arrested the appellant is about 300 metres or more. Thus whether that distance is near or far is subjective. In the absence

of any evidence from PW6, we are of the view that the trial judge's opinion that PW6 himself could have delivered the bag himself is merely speculative.

[27] We have considered the evidence adduced by the prosecution. The appellant was caught with the bag containing the drugs. Thus at the material time, he had possession of the bag and the drugs inside the bag. We agree with the trial judge that knowledge may be inferred from his act of trying to flee. The trial judge has correctly found that the prosecution has established a prima facie case of trafficking against the appellant.

[28] However having considered the defence, we find that we could not discount the probability that PW6 was the real trafficker. Consequently we are of the view that the defence had, on a balance of probabilities, rebutted the presumption under s 37(da) which was invoked against the appellant. In the circumstances, we acquitted the appellant of the charge of trafficking. However we find sufficient evidence to support an offence of possession under s 6 punishable under s 39A(2) of the Act.

CONCLUSION

[29] For the reasons stated above, we allowed the appeal and set aside the conviction and sentence imposed by the High Court. We find the appellant guilty and convicted him for the offence of possession. We sentenced the appellant to 18 years' imprisonment with effect from the date of his arrest and 10 strokes of whipping.

Appeal allowed; conviction and sentence imposed by the High Court.

Reported by Afiq Mohamad Noor